Law Council
OF AUSTRALIA
International Law Section

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Regional Trade Agreements Division
Department of Foreign Affairs and Trade
RG Casey Building, John McEwen Crescent
Barton ACT 0221

Attention: Malaysia FTA Co-ordinator

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DFAT General Review of Malaysia Australia Free Trade Agreement

The International Law Section (**ILS**) of the Law Council of Australia (**Law Council**) welcomes the General Review of the Malaysia Australia Free Trade Agreement (**MAFTA**) which came into force on 1 January 2013.

The ILS agrees with the Department that it is timely to review the objectives of MAFTA to assess the ongoing relevance and effectiveness of the Agreement; to determine whether there may be opportunities for Malaysia to further liberalise its legal services market; and for Australia and Malaysia to engage on opportunities to further expand bilateral trade and investment.

The DFAT General Review is also timely having regard to the dynamic conditions in the Asia Pacific Region and in response to the first Australian Government Comprehensive Services Export Action Plan which was released in April 2021.[1]

Scope of General Review of MAFTA

The terms of reference for the current General Review are broad and may well lead to the text of most Chapters of the MAFTA requiring some modification or redrafting. For this reason, the ILS has decided not to include minor drafting suggestions in this submission.

As noted above, the practical operation and ongoing relevance of the MAFTA has been affected by the Services Export Action Plan as well as other developments in Australian and Malaysian domestic law and policy since 2013. Obviously, the policy areas of financial services, telecommunications, electronic commerce, investment, and competition policy are of particular interest to the Law Council. In this regard, the Law Council's Business Law Section and Federal Litigation and Dispute Resolution Sections are well placed to provide detailed technical commentary on the individual operation of Chapters of the MAFTA at a later stage of the General Review if this would be of assistance to the Department of Foreign Affairs and Trade (**DFAT**).

[1] Commonwealth, Department of Foreign Affairs and Trade, *Australia's Services Exports Action Plan: A Government and Industry Strategy to Boost Services Exports* (April 2021) <https://www.services-exports.gov.au/sites/default/files/2021-03/australias_services_exports_action_plan.pdf>.

Chapter 3 of the MAFTA contains arrangements in relation to Rules of Origin. In May 2017 the Productivity Commission prepared and released a Staff Research Note concerning the practical problems relating to the rules of origin provisions in trade agreements.[2] In response to this Productivity Commission Staff Research note, the ILS has developed a possible approach to the reform of the current Chapter 3 Rules of Origin arrangements in MAFTA, and these suggestions are set out below.

Australia's Services Export Action Plan

The Australian Government's Services Export Action Plan raises novel questions of interpretation in relation to the concurrent operation of individual FTAs which were developed during eras with different public policy settings. In response to the release of this new Services Export Action Plan, it is now possible for the Law Council, in cooperation and consultation with its constituent bodies, to work more effectively with the Regional Trade Agreements Division and where needed, other relevant Australian Government agencies to identify changes that might be required in relation to the MAFTA (and for that matter, other service export and trade agreements), taking into the account the views of the Australian legal profession. In relation to the current MAFTA agreement, the Australian legal profession clearly has an interest in Chapter 2 Trade in Goods; Chapter 4 Customs Procedures; Chapter 7 Trade Remedies; Chapter 8 Trade in Services; Chapter 9 Telecommunications; Chapter 10 Movement of Natural Persons; Chapter 11 Framework on Mutual Recognition Arrangements; Chapter 12 Investment; Chapter 13 Intellectual Property; Chapter 14 Competition Policy; Chapter 15 Electronic Commerce; Chapter 19 Institutional Provisions and Chapter 20 Consultation and Dispute Settlements.

At an early stage of the General Review, the ILS would welcome a discussion with the Malaysian Free Trade Co-ordinator to consider how the Law Council could best contribute to DFAT's proposed work in relation to the MAFTA on an ongoing basis.

Law Council Memorandum of Understanding with the Malaysian Bar Council

By way of background, the Department should be aware that the Law Council entered a Memorandum of Understanding (MOU) with the Malaysian Bar Council (**MBC**) in 2000, the first such MOU entered into by the MBC in recognition of its strong links with both the Law Council and the Australian legal profession. The MBC and the Law Council have maintained a strong relationship since that time through regular mutual exchanges and events promoting the rule of law and the mutual interests of the legal profession. A significant example of the work undertaken pursuant to this MOU were the efforts by the Law Council, DFAT and the then International Legal Services Advisory Council (**ILSAC**) to support the Malaysia Bar Council's 2009 'Roadmap for the liberalisation of the legal services sector in Malaysia.'[3] Since then, the Law Council, through the ILS, has continued to strengthen relationships with counterparts in Malaysia, promote mutually beneficial opportunities and encourage the further liberalisation of Malaysia's market for legal services.

Legal Services Market liberalisation in Malaysia

As has been the case with most bilateral trade agreements Australia has signed, the MAFTA contained limited binding outcomes specifically on legal services, although various outcomes

[2] Wayne Crook and Jenny Gordon, *Rules of Origin: can the noodle bowl of trade agreements be untangled?* Productivity Commission Staff Research Note (May 2017) <https://www.pc.gov.au/research/supporting/rules-of-origin>.

[3] Malaysian Bar Council, *Roadmap for Liberalisation of the Legal Services Sector in Malaysia* (2009), approved by the Malaysian Bar Council and finalised 8 July 2009.

affecting professional services and the movement of natural persons (MNP) impact lawyers. Notwithstanding this, Malaysia agreed to partially liberalise its legal services market at around the same time with the introduction of a Bill to the Malaysian Parliament in 2012 to establish a system for the regulated practice of foreign law in Malaysia.

The catalyst for liberalisation of legal services in Malaysia was the May 2008 announcement by the Bank Negara that it would permit the entry of five UK law firms to provide advice in relation to Islamic banking and finance. At that time, this was prohibited under the *Legal Profession Act 1976* (Malaysia). The need for international expertise in this niche area arose from years of growth in the Islamic finance sector following the Bank Negara's decision to bring forward its liberalisation program of the sector around 2004.[4] The May 2008 announcement ultimately resulted in reforms to the *Legal Profession Act* 1976 and the establishment of a new framework for the regulation of foreign law firms and foreign lawyers in Malaysia. These reforms entered into force on 3 June 2014.

Since 2014, there have been no significant changes to improve access for Australian lawyers and law firms. However, it should be noted that since 2018, further reform of lawyer regulation in Malaysia has been actively debated. In January 2019, the MBC submitted to the Attorney General a proposed new Act to govern the legal profession and it seems that further consideration may have been delayed due to COVID-19 and other local developments.

Constraints on Australian legal services providers accessing the Malaysian legal services market

Australian lawyers and law firms face barriers to legal practice in Malaysia. These barriers are evidenced by the fact that since 2018, only one Malaysian law firm has employed a foreign lawyer.[5] Further, Australian law firms are discouraged from establishing a commercial presence in Malaysia due to restrictions on permitted practice areas and limitations to the types of commercial structures they are permitted to use. The restrictive nature of regulations on commercial presence of law firms in Malaysia is evidenced by the fact that since 2014, only two foreign law firms have been granted a Qualified Foreign Law Firm (QFLF) license in Malaysia.[6]

A contributing factor to the slow uptake of QFLF licenses in Malaysia is likely due to most international law firms choosing to provide legal services to Malaysian clients through existing offices in Singapore. Anecdotal evidence suggests such firms engage in, fly in fly out (FIFO) practice in Malaysia or meet clients outside of Malaysia. This is likely due to Singapore's hospitable regulatory environment for foreign lawyers and law firms which was first established in January 2000, and which has subsequently been further liberalised.

It is also possible that certain 'behind the border' barriers to entry for Australian firms exist which are not explicitly expressed in the *Legal Profession (Licensing of International Partnerships and Qualified Foreign Law Firms and Registration of Foreign Lawyers) Rules* 2014. During the debate on the Legal Profession (Amendment) Bill 2012, the Hansard of the Malaysian Parliament dated 11 June 2012, page 44, para 1 states:

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[4] Bank Negara Malaysia, *Annual Report,* 2004. The ILS notes the growing importance of sharia-compliant financing in Australia and for the international and domestic interests of Australian financial institutions.

[5] Aparna Sai, 'Azmi receives Malaysia's first license to employ foreign lawyer' *Asian Legal Business* (online, 26 November 2018) <https://www.legalbusinessonline.com/appointments/azmi-receives-malaysia%E2%80%99s-first-license-employ-foreign-lawyer/76855>; see further: 'Foreign Lawyers and Foreign Law Firms' *Malaysian Bar*, <https://www.malaysianbar.org.my/article/find/legal-directories/foreign-lawyers-or-law-firms/foreign-lawyers-and-foreign-law-firms>.

[6] Trowes and Hamlins in 2015 and Herbert Smith Freehills in 2017.

> "As part of the measures to develop Malaysia as an international Islamic financial hub, the legal profession will be liberalized to allow up to five top international law firms with expertise in international Islamic finance to practice in Malaysia. These firms will only be allowed to offer legal services in international Islamic finance. Successful law firms will be determined based on credentials and the business plans in respect of the office to be established in Malaysia."[7]

Fly in Fly out legal services

An Australian foreign lawyer may engage in the FIFO, (Mode 4) practice of law in Malaysia for up to 60-days in a calendar year. Practice beyond 60 days on a FIFO basis is not permitted. Data on the prevalence of FIFO practice of law by Australian lawyers in Malaysia is not available. However, the 60-day limit in Malaysia limits cross-border supply of legal services and may interfere with the capacity of some foreign lawyers to provide services to Malaysian clients in respect to complex legal issues. By contrast, in Australia, a Malaysian foreign lawyer may engage in FIFO practice of law for up to 90 days without registration and for more than 90 days if they register as a foreign lawyer.

The current General Review of MAFTA may identify opportunities for Malaysia to further liberalise and expand bilateral trade and investment by amending its FIFO regime to reflect Australia's generous FIFO rules which apply to Malaysian foreign lawyers.

Chapter 3 MAFTA Rules of Origin

A Productivity Commission Staff Research Note prepared by Wayne Crook and Jenny Gordon was released in May 2017, entitled 'Rules of Origin: Can the noodle bowl of trade agreements be untangled?'[8] This work underpins the view of the ILS that a revision of the Rules of Origin currently in Chapter 3 of MAFTA should be carried out with a view to achieving two basic objectives:

- First, to ensure where possible that the rules of origin under MAFTA are appropriately aligned with the rules of origin in the AANZ FTA, to which Australia and Malaysia are parties. This would ensure that there is minimal complexity or confusion amongst the trading community as to which rules of origin to apply. Related to this is the broader objective of ensuring, where possible, that the MAFTA rules of origin are consistent with other FTAs that Australia has entered.
- Second, to ensure that the rules of origin impose the minimal barriers to trade to enhance the trade liberalisation objectives under MAFTA.

The ILS appreciates that these two objectives will sometimes conflict or require balancing. However, DFAT, in consultation with stakeholders, is encouraged to approach the current General Review of these rules of origin provisions in MAFTA with these objectives in mind. These issues are a particular concern (and create real challenges for the trading

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[7] See 'Liberalisation of Legal Services', *Malaysian Bar* (7 September 2012) <https://www.malaysianbar.org.my/article/members/become-a-member/foreign-lawyer-lawfirm/liberalisation/liberalisation-of-legal-services>.

[8] Wayne Crook and Jenny Gordon, *Rules of Origin: can the noodle bowl of trade agreements be untangled?* Productivity Commission Staff Research Note (May 2017) <https://www.pc.gov.au/research/supporting/rules-of-origin>.

community) when documentary requirements for proving origin and maintaining origin are applied in relation to goods which are transhipped.

Under MAFTA, an exporter of goods from Malaysia to Australia requires a certificate of origin issued by the Malaysian Ministry of International Trade and Industry, whereas an Australian exporter of goods to Malaysia only requires a Declaration of Origin (self-issued on company letterhead). Therefore, the documentary requirements for an Australian importer of Malaysian goods are more onerous than those for an Australian exporter of goods to Malaysia. The ILS submits that a Declaration of Origin applying to all traders under MAFTA would be preferable as it would lower the compliance burden on Australian importers and make the requirements consistent between Australian exports and Australian imports to and from Malaysia.

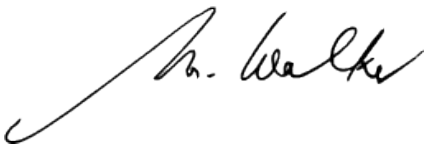
The ILS understands that under the AANZ FTA, a Certificate of Origin is required by all parties. However, it also understands that under the recent review of the AANZ FTA, consideration has been given to permitting importers and exporters of contracting parties to utilize Declarations of Origin in lieu of Certificates of Origin.

Another significant issue for the trading community is the consignment rule (refer MAFTA rule 3.14), which determines how direct a shipment must be to maintain country of origin preference. The ILS notes that the transhipment rule in MAFTA is slightly different from that under the AANZ FTA. Under both FTAs, there is a prohibition on any third country production and only operations such as unloading to preserve the goods or for transporting the goods are permitted. However, under the AANZ FTA, goods shipped are not permitted to enter the commerce of a third country whereas this express restriction is not in the text of MAFTA. Accordingly, the ILS submits that there should be an alignment between the transhipment rule under MAFTA and the AANZ FTA, subject to any necessary clarification that such a change would not pose any practical difficulties for the trading community.

Concluding Remarks

The ILS hopes that this submission will assist the Regional Trade Agreements Division as it formulates its approach to the current General Review of MAFTA and looks forward to an early discussion and engagement with the Malaysia Free Trade Co-ordinator to determine how the Law Council can contribute to the project on an ongoing basis.

Yours faithfully



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